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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1945.

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OBEAR-NESTER GLASS COMPANY,	}	No. 416.
Petitioner,		
v.		
UNITED DRUG COMPANY,		
Respondent.		

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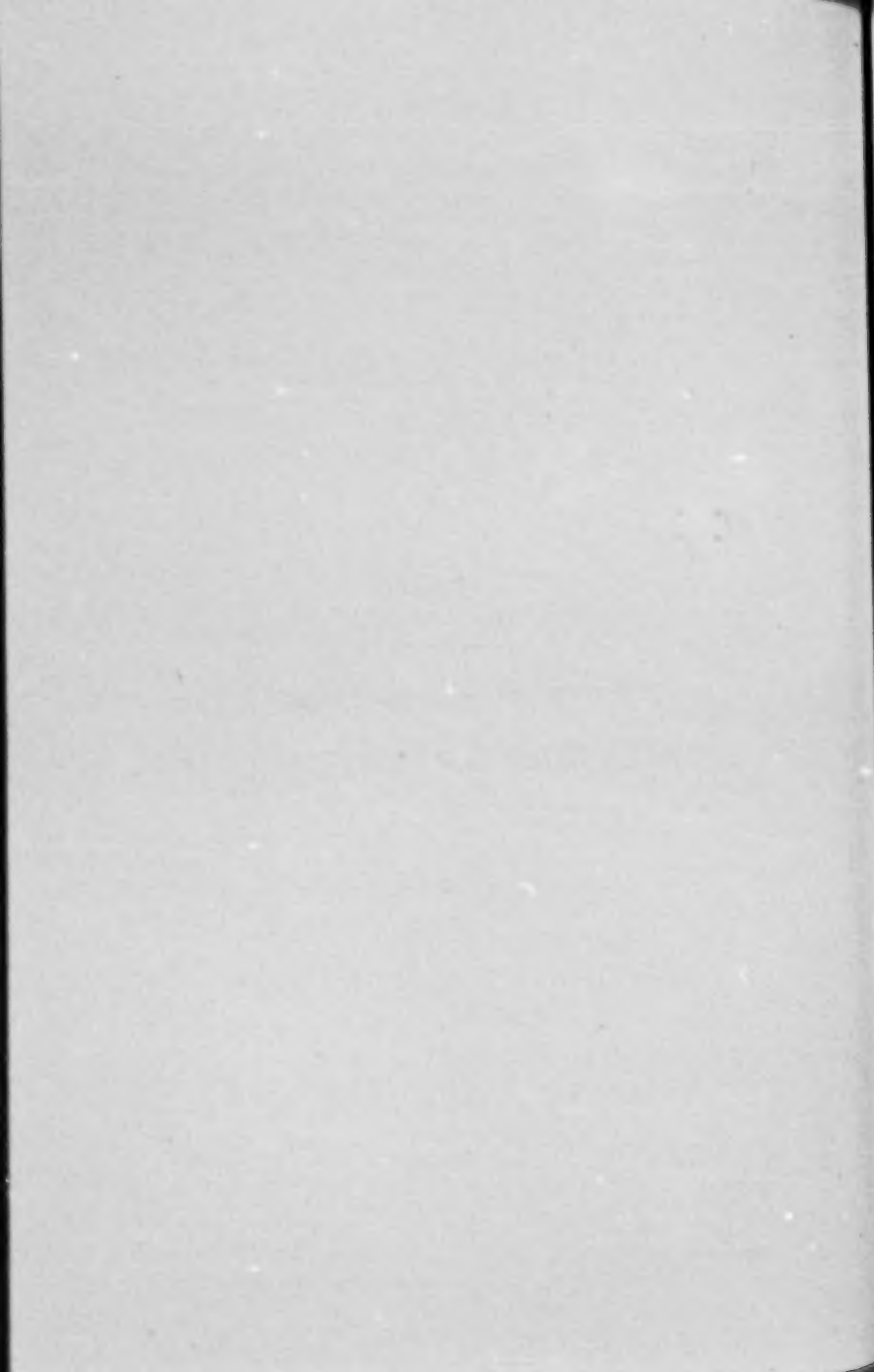
**REPLY BRIEF FOR PETITIONER.**

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St. Louis, Missouri,  
October 4, 1945.



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The question involved in this petition revolves around whether or not the court below could have arrived at its result had it applied the proper legal principles. Our main brief stated that we would not ask this Court to adjudge the wisdom of fact findings; but we do ask this Court to rule that conclusions, derived from an improper legal premise, shall fall with the premise.

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Thus we pass over respondent's arguments as to the stability of findings of fact. This is not a debate about their accuracy; it is a contention by petitioner that they could not have been made at all under proper burden of proof rules.

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The only attempt by respondent to discover evidence to support the judgment below was to extract one statement from the entire testimony on the *main trial*, and to refer to a statement on the accounting made with respect to some other bottles of *petitioner* that had no bearing whatever on the issue of profits.

The District Court and the Court of Appeals both decreed that infringement existed. The statement by *petitioner's* vice-president, that the entire phrase "The Rexall Store," means to him that the bottles contain something sold by a Rexall Store, was only a particle of the total evidence. Infringement was decreed because of the dominant character of the imprinting of the word REXALL as the outstanding part of the phrase. What the entire phrase means, including the dominant and obscure words, is immaterial. Injunction and recovery have repeatedly been granted for just such embodiments of trade marks as dominant parts of longer words or phrases.

But the primary rejection for respondent's argument lies in the fact that the courts both had already adjudged that confusion was likely, whatever may be said for this fragment of testimony in the whole record then before them. The question here is a legal one. Can a special master, without any evidence developed before him, go back to the original record, extract a single statement therefrom, and use it as a basis to shift the burden of proof, particularly where this requires his reaching a conclusion opposite that established by the judgment on the main trial based upon the whole evidence? When the case reached the master on the accounting, likelihood of confusion was an established and an adjudicated fact—the law of the case. Under the statute, this meant that all sales by respondent were presumed to have been made because of confusion, and would remain so until respondent

actually supported its burden of proving to the contrary, as to some or all of them. Respondent here made no such proof.

If the special master can revert to the original record in this manner, then the statutory rule that a plaintiff satisfies its *prima facie* burden by proving a defendant's sales, is not true. Nor is there any substance to the doctrine of law of the case. For every plaintiff will be required not only to prove the defendant's sales, but also to rebut again on the accounting, the defendant's evidence on the main trial, and, in effect, retry the issue of likelihood of confusion.

There was, therefore, no proper evidence on the accounting to support respondent's burden to prove absence of confusion in its sales. Certainly there was no legal evidence that would enlarge petitioner's statutory burden of proof.

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Respondent devotes much argument to cases on damage award in trade mark and unfair competition. The present petition is related solely to the matter of profit recovery, and such argument is totally impertinent. We urge the Court to distinguish between a plaintiff's recovery of a defendant's profits, and a plaintiff's recovery of its own lost profits as a measure of damages. The latter is strictly a damage recovery, foreign to this petition, and respondent's citation of cases on this rule are inapplicable here.

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Respondent argues that it produced evidence in the case. This is not the point. We state that respondent produced no evidence to support its legal burden to prove that any of its sales was made without confusion. That is the issue of this petition. Respondent did produce an account.

Whether or not it proved the dollar amounts of overhead is not an issue on the petition. The courts below held that it did not. Each tribunal has held that respondent made a profit from its infringing sales.

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The basis upon which this petition is sought is a single one. It is not one that assails fact findings as such. It is not one related to damages. It is not a question of which items of overhead were proved and which were not.

The issue is whether, in an accounting based upon the 1905 Trade Mark Statute (15 U. S. C. 99), following a decree that confusion is likely, a plaintiff satisfies its entire *prima facie* burden when it proves a defendant's sales. Or does a plaintiff in such case have to prove, as a part of its *prima facie* case on the accounting, that confusion existed in the sales?

If the decision below is to stand, then a plaintiff must prove confusion. Certainly the decision inhibits a plaintiff from relying solely on proof of the defendant's sales, as a full *prima facie* case. But this is contrary to the statute, and to the decision of this Court in the *Mishawaka* case, 316 U. S. 203. Only by decision of this Court can the conflict be eliminated.

OBEAR-NESTER GLASS COMPANY,

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